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IN THE
SUPREME COURT OF THE UNITED STATES
_____TERM 197_

70-191

No. ~~1233~~

THOMAS RAY SANDELL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
TERM 197_

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No.

THOMAS RAY SANDELL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

---

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a Writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 15, 1971.

## CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court for the Southern District of Florida, is printed in Appendix A hereto and is reported in _____F. 2d_____.

## JURISDICTION

The opinion of the Court of Appeals (Appendix A) was entered on March 15, 1971. The judgment of the Court of

Appeals (Appendix B) was also entered on March 15, 1971. Petition for Rehearing was denied April 22, 1971 (Appendix C).

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## THE QUESTIONS PRESENTED

1. Was an in-court identification of Petitioner by a government witness preceded by prior photographic identifications so impermissibly suggestive as to give rise to a substantial likelihood of misidentification?

2. Was it error to permit a government witness, "under the rule", to make an in-court identification of Petitioner even though a police officer, also a government witness, pointed out Petitioner through a window in the courtroom?

3. Was it error to permit an in-court identification by a government witness, who had made a prior out-of-court identification at an improper line-up, particularly in view of the fact that the overt act which the witness testified

about was, according to the indictment, an act of a co-defendant?

4. Was it error to submit the cause to a jury?

5. Was it error to admit into evidence testimony of a government witness concerning an alleged conversation with Petitioner after the alleged conspiracy had terminated?

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the indictment, self-incrimination and due process clauses of the Fifth Amendment and the right to be informed of the nature and cause of accusation and right to counsel clauses of the Sixth Amendment to the United States Constitution (Appendix D).

## STATEMENT OF THE CASE CONTAINING FACTS MATERIAL TO THE CONSIDERATION OF QUESTIONS PRESENTED

This is a criminal case arising under Title 18 U.S.C. §371 and 2314. Petitioner was indicted for conspiracy and transporting a forged security (a $50.00 American Express money order) in interstate commerce. There were four persons charged in the indictment. Petitioner

was tried with one of the others, a certain Richard Seader (copy of indictment, Appendix E). Trial was before a jury and both defendants were found and adjudged guilty. Petitioner's motion for a new trial was denied.

Sometime prior to October 7, 1968, the first date Petitioner is alleged to have any connection with the cause, a store was broken into and an unspecified number of blank American Express Money Order forms were stolen. Petitioner had no connection with, or knowledge of, the break-in. Some of the stolen money order blanks were filled in and cashed.

One of the money orders that was cashed was cashed at a rental car agency. By Count Five of the indictment, a co-defendant, Richard Seader was charged with cashing this money order (together with another person who was not tried). This co-defendant had been previously tentatively identified from a photograph by Donald Lincoln Hill, who was the manager of the rental car agency. Mr. Hill was a witness for the government at trial, where he testified that it was petitioner, not the co-defendant, Seader, who was with the person who cashed the money order. Upon motion of the co-defendant, Seader, Count Five of the indictment was dismissed, near the end of the second day of trial.

Mr. Hill testified that a man drove a young lady to the car rental agency. He saw this man's head and shoulders from where he was sitting in the driver's seat of the car from about 10 to 12 feet from the passenger's side of the car. Subsequently, after first making a tentative identification of Seader, Mr. Hill was at the Palm Beach County Jail. Sandell (Petitioner) was also at the jail with a group of others against a wall near the booking desk. It took him forty-five minutes to an hour to make the identification which was made with the help of "other circumstances". Petitioner had no counsel present at the time of this line-up type identification. The young lady who rented the car testified, in response to a question from the prosecutor, that someone other than Petitioner drove her to the car rental agency. The money order was cashed at the car rental agency. The money order was cashed at the car rental agency on October 9, 1968. The prior photo identification of Seader was made on or about October 11 or 12, 1968.

On October 8, 1968 a forged money order for $50.00 was cashed at a Savings and Loan Association by a dark haired man with a moustache identifying himself as Clifton J. Carlin, who told the teller he was musician. The teller who cashed the item was Carroll Helen Chesser. On October 24, 1968, a detective from the West Palm Beach Police

Department interviewed Miss Chesser. During the course of the interview he showed Miss Chesser six photographs. Of these six, two were photographs of Petitioner. One of these two was a "mug shot", taken only three days before, clearly showing on its face "Palm Beach County Sheriff's Dept. 62548 10-21-68". This witness could not be made to recall seeing the photographs or making the photographic identification on October 24. She had no memory of ever seeing these photographs. On or about November 3 or 4, 1968, the witness was again interviewed, this time by an F.B.I. agent, at which time she again identified Petitioner from photographs. On the first day the trial was scheduled, the witness was again shown photographs of Petitioner by an F.B.I. agent to refresh her memory. In addition, Petitioner was pointed out to the witness by a police officer witness through a window in the door to the courtroom, during the course of the trial. The rule had been invoked. Petitioner was in custody at the time of the initial photographic identification on October 24.

Joseph Gregory, a co-defendant who had entered a plea of guilty, was called as a government witness and testified voluntarily as a prosecution witness. He testified that he had false identification in the name of Clifton J. Carlin, that the endorsement on the money order cashed by Miss Chesser was his, that he cashed forged money orders but did not

remember how many or where he cashed them. He further testified that at the time the money order was cashed he, like the person who cashed it, had a moustache and that he was a musician. The verbal description of the person who cashed it fit Gregory.

## REASONS FOR GRANTING THE WRIT

This petition raises substantial questions concerning criminal justice, and the proper application of this Court's decisions in United States V. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926(1967) and Simmons V. United States, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 1967(1968) and similar decisions.

A mere suspicion of guilt shown by evidence at trial is not sufficient to submit the question of guilt to a jury, Wood V. U.S. (C.A. 5, 1960) 283 F. 2d 4. The only evidence that Petitioner ever cashed a forged money order was the testimony of Carroll Helen Chesser, a teller at a Savings and Loan Association where one of the forged instruments was cashed. She was allowed, over Petitioner's objection, to make an in-court identification of Petitioner. The challenge of this in-court identification is based primarily on Simmons V. United States, 390 U.S. 337, 19 L. Ed. 2d 1247, 88 S. Ct. 967(1968). A comparison of this case with Simmons shows: (1) when the pre-trial photographic identification was made in Simmons the suspect was still

at large--Petitioner was in custody; (2) the photographs in Simmons were snapshots obtained from a sister of the suspect--Petitioner was identified from a recent and clearly marked "mug shot"; (3) in Simmons five different people separately identified the suspect from snapshots the day after the crime--in this case the photographic identification was made by a single witness from a mug shot three weeks after the crime; (4) in Simmons this court found there was a compelling reason for the photographic identification because, inter alia, the suspect was at large--in this case there was no compelling reason; and (5) from the factual situation as related in Simmons there was no question of the identification witness denying the first photographic identification--in this case the witness denied that she made a photographic identification on the occasion where she identified him from a three day old mug shot on her first interview by the police.

This court has recognized that a person may retain in his memory the image reflected in a photograph rather than the person actually seen, Simmons, supra, at 19 L. Ed. 2d 1247, 1253. Miss Chesser, the teller, did not remember seeing the photographs and making an identification from the recent mug shot on October 24, 1968. She did remember the November 3 or 4 photo identification and the memory refreshing photo identification on the first day the trial was scheduled. The fact that she did not remember the first

photo identification is a strong indication that it was the image of the forgotten photograph that caused her to recognize Petitioner at trial. This possibility is made even more probable by the fact that at the time of the forgotten photographic identification Petitioner was emphasized in two ways: of six photographs, two were of Petitioner, and one of these two was a clearly marked mug shot which showed that it was taken only three days ago. The probability that she was mistaken is further demonstrated by the fact that the verbal description of the person who cashed the money order fit Joseph Gregory, a man with dark hair, dark moustache, (Petitioner has light hair and light moustache) a musician, using the name of Clifton J. Carlin, who endorsed the money order and cashed some money orders at places unknown. Except for the identification which was tainted by the impermissably suggestive pre-trial photo identification procedures, all of the evidence showed that Gregory--not Petitioner--cashed the money order.

A different question is presented by the identification made by the witness Donald Lincoln Hill, the manager of a car rental agency. The Fifth Amendment to the United States Constitution provides that no person shall be held to answer to a crime unless on an indictment of a Grand Jury, nor be deprived of liberty

without due process of law. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation and to have the assistance of counsel for his defense. Petitioner was never charged with any offense nor indicted nor informed of any accusation which would in any manner indicate that it would be necessary to prepare a defense concerning any activity at a car rental agency managed by Donald Lincoln Hill. At the trial the government produced as a witness, Donald Lincoln Hill, the manager of a Merlin car rental agency, who was allowed to make an in-court identification of Petitioner as the person who drove a young lady (a co-defendant who had entered a plea of guilty and was not tried-Sandra Jean Neal) to his car rental agency and rented a car, giving a forged money order as a deposit. A co-defendant, Richard Seader, was identified by Mr. Hill two or three days after the car was rented, from a photo shown him by Homestead police and Seader was charged in the indictment (Count Five) in connection with this money order given to Merlin as a deposit on the rental car. On the second day of trial after Hill identified Petitioner, Count Five was dismissed. Mr. Hill's testimony was undoubtedly prejudicial to Petitioner. That he was an unreliable witness can be inferred from the record which shows that he first tentatively identified Seader. He also made a

pre-trial identification of Petitioner in what would amount to an improper line-up at the Palm Beach County jail. He was brought in to the jail to identify Miss Neal. Petitioner was also at the jail and a detective had Mr. Hill observe Petitioner for several minutes while Petitioner was leaning with his back against a wall, with others, at the booking desk of the jail. After about forty-five minutes, and with the help of "other circumstances" he finally made an identification of Petitioner. However Seader was the one charged in the indictment--not Petitioner, indicating that the government placed little importance to this jail identification by Mr. Hill. Petitioner was never charged in connection with the car rental agency forged money order matter yet the government to the great prejudice of Petitioner allowed this witness to testify against Petitioner on a matter he was not even charged with. If Petitioner had been provided with counsel at the jail identification procedure, this in-court misidentification in all probability would never have occurred, Wade V. United States, supra. As further evidence that the government itself was not convinced that Mr. Hill had made a proper identification, it introduced into evidence the photograph of Seader which Mr. Hill had previously identified as the man who was with Miss Neal when she gave Mr. Hill the forged money order. Petitioner was in effect tried for a crime he was not accused of

and the evidence used against him was secured from an unreliable witness as a result of an improper line-up procedure, with no attempt made to provide him with counsel. The Court of Appeals for the Fifth Circuit placed little importance to the testimony of Mr. Hill. The opinion on pages 20 and 21 indicates that even if allowing his testimony was error, it only showed that he made one automobile trip with Miss Neal, and could not be prejudicial. This was not just "one automobile trip", this was evidence improperly adduced apparently for two reasons, first, if Mr. Hill identified Seader it would tend to show him guilty as charged in Count Five but if he identified Petitioner it would lend some credence to the very meager evidence of co-conspirators that Petitioner may have had some knowledge that forged checks were being cashed. Justice requires that an accused be advised of the nature of charges against him and if the government intended to try him for Count Five it should have presented evidence to a Grand Jury sufficient to indict him on that charge. It was fundamental error to allow Mr. Hill's testimony to stand. The unfairness of the government's position is apparent and to allow a conviction obtained in such a manner to stand would be unjust.

Both the District Court and the Court of Appeals made little of Petitioner's contention that it was prejudicial error

to admit evidence of a post-conspiracy conversation between Petitioner and Joseph Gregory, the person who probably cashed the $50.00 forged money order that Petitioner was convicted for cashing. Over the objection of Petitioner, the government was allowed to examine Gregory regarding a conversation with Petitioner that happened long after the alleged conspiracy had ended and the indictment had been filed. The testimony apparently had nothing to do with the conspiracy as charged and was calculated to inflame the minds of the jurors against Petitioner. The government made no claim that the conspiracy was of a continuing nature, see Fiswich V. United States (1946) 329 U.S. 211, 91 L. Ed. 196, 67 S. Ct. 224. No new conspiracy was charged, see Gruenwald V. United States (1957) 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963. The danger to a defendant in a conspiracy trial is great enough without having testimony concerning events after the conspiracy has ended admitted against him, thereby giving the government an unfair and prejudicial advantage.

At the conclusion of the government's case, Petitioner moved for a directed verdict of acquittal and this motion was renewed at the conclusion of all the evidence. The District Court denied the motions and the Court of Appeals brushed it aside by saying that this ground was without sufficient merit to warrant discussion. It is fundamental that in order for the government to prevail in a

criminal prosecution it must produce competent evidence which would show guilt beyond a reasonable doubt. In opening remarks the prosecutor advised the jury that the government would prove that Petitioner cashed a forged money order at First Federal Savings and Loan Association of West Palm Beach and intimated that evidence would be offered of handwriting comparisons, particularly the endorsements on money orders. No such testimony or evidence was present. This was tantamount to the prosecutor, not under oath and not subject to cross-examination, testifying. As a matter of fact the money order that Petitioner was charged with cashing was endorsed by Joseph Gregory--not Petitioner. This is an uncontroverted fact, and this standing alone should have been sufficient to grant a directed verdict of not guilty as to Count Two. But further, all of the evidence, including the testimony of the chief prosecution witness, with the exception of the in-court identification, pointed not to Petitioner, but to Gregory. The in-court identification by the witness (Chesser) was tainted by the prior photographic identification procedure that was so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification, and this question should not have been left to a jury, Simmons V. United States, supra. In Simmons, this Court said (19 L. Ed. 2d 1247, 1253):

"...This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the juror he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."
(Emphasis Supplied)

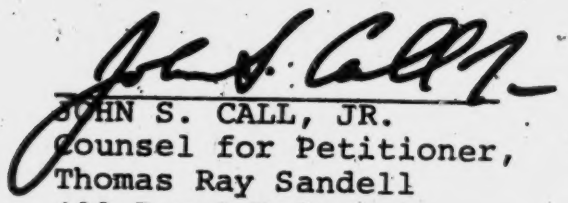
The witness, Chesser did not remember the photos she saw on October 24, but she retained the image of the photos. When she saw Petitioner at trial the image of the photo became Petitioner. She identified him. The totality of the circumstances surrounding the forged money order cashed at the Savings and Loan Association, the endorsement by Gregory, the use of the name Clifton J. Carlin by Gregory, the fact that Gregory fit the verbal description, the fact that Gregory cashed money orders on the same day in the vicinity but did not remember

just where or how many, the fact that Petitioner testified he was someplace else at the time and a defense witness corroborated this, the tainted nature of the pre-trial identification procedures of the witness, all show without question that there was a reasonable doubt, as a matter of law, that Petitioner was the person who cashed the money order, and the question should not have been submitted to a jury. The Court of Appeals attached no significance to the initial display of six photographs containing a recent mug shot of Petitioner and a second photo of Petitioner, since she had forgotten seeing those photos, and on the witness stand could not be made to recall seeing them, see pages 19 and 20 of opinion, Appendix A. The Court of Appeals further placed no importance to the fact that she saw (and was told by another witness who he was) Petitioner sitting at the counsel table during trial with his back to her. Perhaps this standing alone would not be reversable error, but this was just one of several events that cast doubt on the identification, the memory refreshing view just before she testified, the verbal description that fit the man who endorsed the money order, etc. The least that could be said is that a view of the accumulation of circumstances, justice would require a new trial, even though it is Petitioner's position that a judgment of acquittal should have been granted the quantum of proof had not been met by the government.

## CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted



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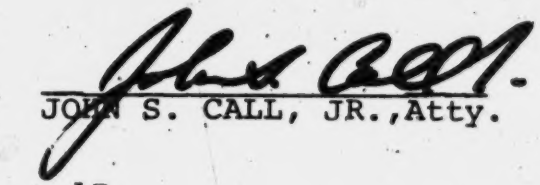
## CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon: Solicitor General, Department of Justice, Washington, D.C. 20530 by Air Mail, postage prepaid, and one copy on United States Attorney, P. O. Box 1070, Miami, Florida, by first-class mail, postage prepaid, this 20th day of May, 1971.



JOHN S. CALL, JR., Atty.

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 29679

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD SEADER and THOMAS RAY SANDELL,
Defendants-Appellants.

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*Appeals from the United States District Court for the Southern District of Florida*

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(March 15, 1971)

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Before GEWIN, COLEMAN, and AINSWORTH, Circuit Judges.

COLEMAN, Circuit Judge. The grand jury for the Southern District of Florida indicted Thomas Ray Sandell and Richard Seader for conspiring to transport falsely made and forged securities, to-wit, American Express Company money orders stolen in a burglary of a 7-11 store located in Homestead, Florida, in violation of 18 U.S.C., §371.

In Count 2 Sandell was indicted for the transportation in interstate commerce of a forged American Express Company money order, No. AT 737-008-664, 18 U.S.C., §2314.[1]

In Court 3 Seader was similarily indicted for the transportation in interstate commerce of another Ex-

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[1] 18 U.S.C., §2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof —

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

press Company money order, knowing the same to have been falsely made and forged, 18 U.S.C., §2314.

Sandra Jean Neal and Joseph Gregory were also indicted. They entered pleas of guilty. Gregory was called as a witness for the Government. Seader called Sandra Neal as a witness.

After a four day trial, the jury found Sandell and Seader guilty as charged. We affirm.

Sandell seeks reversal on no less than eight grounds. It is said that the evidence was insufficient to sustain the convictions, that Sandell's motions for directed acquittal should have been granted, that the trial court unduly restricted cross examination on behalf of Sandell, that testimony concerning certain conversations with one Joseph Gregory was erroneously admitted, that there was error in the instructions, and that Sandell should have been granted a new trial. We have read the trial transcript and are left with the decided opinion that these contentions are not of sufficient merit to warrant discussion.

Sandell's remaining contentions deal with certain identification procedures, the use of photographs and an appearance at a booking desk, which he says were so impermissibly suggestive, or otherwise illegal, as to void his convictions.

Seader says that the evidence was insufficient to support his conviction, that the above mentioned testimony of Gregory should have been excluded, that the

attitude of the trial judge denied him a fair trial, and that there was error in the denial of certain jury instructions requested on his behalf.

The outcome of this case as to both defendants really depended on whether the jury chose to believe the witnesses for the Government or those for the defense. This was a difficult case to try, yet we detect nothing that would cause us to suspect that the trial judge failed to handle it in a commendably fair and impartial manner.

Seader's contentions do not merit a reversal and his conviction is affirmed.

Sandell's arguments as to his identification by Mrs. Carroll Helen Chesser and Donald Hill, to be determined within the context of all the evidence, require more extended discussion.

Minda Mondy Shiland was the first witness for the prosecution. She was personally acquainted with both Seader and Sandell. She met Seader while she was employed in Homestead, Florida. She accompanied Seader and Joe Gregory to Sandell's home in Palm Beach on a Sunday morning in October, 1968. Seader and Gregory had with them about twenty of the stolen Express money orders. After the Sunday conversations at Sandell's she spent the night in a motel in the Palm Beach area while the other two returned to Homestead to retrieve the money order machine. They returned early Monday morning, after which all three again went to Sandell's house, with the money order machine

in the trunk of the automobile. After a brief visit in the Sandell house, Shiland saw Seader take a dirty clothes basket out to his automobile, put the money order machine in that container, bring it back in the house, and deliver it to Sandell. They were also at Sandell's on at least two other days that week. It was her testimony, *and that of Joe Gregory*, that during these visits Seader and Gregory, in return for the money order machine and forms, obtained false identification papers from Sandell, that is, Florida driver's licenses and a Woolco credit card typed out by Sandell in the names of individuals taken from a telephone book. These false driver's licenses were used as identification upon which to cash many of the stolen money orders.

The second witness for the Government was Elmo Frederick Midyette, Jr. Midyette was personally acquainted with both Seader and Joseph Gregory, as well as with Miss Shiland. He also knew David Bishop, one time assistant manager of the 7-11 store in Homestead. Midyette personally participated in and described the entry into the 7-11 store on October 5, 1968, and the taking of the money order machine and the money order forms. The other participants were Joe Gregory and assistant manager Bishop. Seader did not enter the store but waited about a block away and thereafter went with the others to a canal bank where they "printed up" the money orders. They had taken nine books, consisting of 180 forms. Seader was present when they discarded the money order machine and some of the forms on the canal bank. Midyette, within a few days, was arrested by the Prince George County, Virginia,

police department and held because he had some of the money order forms in his possession.

The next witness was Mrs. Carroll Helen Chesser. Mrs. Chesser was the head teller at the First Federal Savings and Loan Association of West Palm Beach. She testified that on October 8, 1968, Sandell presented and she cashed the stolen money order described in the indictment. She identified this instrument by her teller's stamp and her handwriting. At the cashing, Sandell wore a moustache, had dark hair, and a receding hairline. He told her that he was a musician with a band in Miami.

She did not see Sandell again until the day prior to her testimony, when she ran into him in a corridor of the courthouse. Sandell was on bail at the time and not in the company of officers. No one pointed him out to her but she recognized him.

Mrs. Chesser was about to make an in-court identification of Sandell when his counsel objected and the jury was retired. Mrs. Chesser then testified that about November 8, 1968, an F.B.I. agent came to see her about the missing money orders. He had several photographs of white men, some young and some middle-aged. There were four or five of them. She had previously stated to the detectives that the man for whom she cashed the money order had a moustache, dark hair, and a receding hairline. About a week before the trial, for the second time, she was shown the same pictures by the F.B.I. On both occasions she identified

Sandell's picture as being that of the man who had cashed the money order.

Joe Gregory was brought in to see if he, not Sandell, was really the man who cashed the money order, as they resembled each other, at least as to age, color of the hair, and moustache. Mrs. Chesser insisted that it was Sandell who cashed the money order, that there was no question in her mind of the correctness of her identification.

While the jury remained out of the courtroom, the defense called Robert E. Wonderle, a state oficer, who testified that on the previous day, while the witnesses were excluded from the courtroom and were "waiting in the hallway all day long", Mrs. Chesser looked through the glass in the door to the courtroom and asked, "Is he in the courtroom" (referring to Sandell)? The officer replied, "He is sitting at that table", but Sandell's back was turned and "she couldn't identify him."

Mrs. Chesser's testimony was also vigorously attacked on the ground that soon after the discovery of the bogus character of the money order, Mr. Wonderle, the state officer, had shown her a pack of five or six pictures, which included two pictures of Sandell. One of these pictures was a mug shot, recently taken by the Sheriff's office, apparently when Sandell was arrested on October 21 for some other offense. Mrs. Chesser had fogotten about being shown these pictures and could not recall it on the witness stand. Sandell says that Mrs. Chesser's inability to recall the first

photographic display proves that the mug shot caused his identification.

Sandell's attorney objected to the testimony of Mrs. Chesser under the *Wade*[2] case in that Sandell had no lawyer present when the photographs were exhibited to her or when she looked through the window into the courtroom and that the procedures thus invoked were impermissibly suggestive. The motion to suppress Mrs. Chesser's testimony was overruled and Mrs. Chesser, in the presence of the jury, positively identified Sandell from the witness stand as the individual who cashed the stolen money order. She testified that Sandell used for identification a driver's license bearing the name of "Clifton J. Carlin". Joseph Gregory was again brought to the courtroom, before the jury, and Mrs. Chesser said she did not recognize him.

Later on, Joseph Gregory testified that the "Clifton J. Carlin" driver's license was given him by Sandell and that he used it to cash various money orders, at least one of them at a point near in time and place to the episode described by Mrs. Chesser. Also, Gregory testified that he was under the influence of narcotics most of the time, including LSD on one occasion. He said he had been off narcotics for seven months at the time of the trial.

Gregory also testified that he went to Sandell's house in the early part of October, 1968, with Richard Seader,

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[2]United States v. Wade, 1966, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149.

where he met Ray Sandell, Sandra Jean Neal, and another person whom he did not know. He saw Sandell type out the false driver's licenses and give them to Gregory and to Seader, as well as a Woolco credit card which was given to Seader.

Sandra Jean Neal, the indicted co-defendant who pleaded guilty, testified that she was at Sandell's home when Minda Mondy, Richard Seader, and Joe Gregory came there on Sunday morning, October 6, 1968, that Seader talked with Sandell in one of the back-rooms, but she heard none of the conversation. They all came back to the house on Monday, but Sandell was not there. She left with them and afterwards went to Miami with Joe Gregory, who, on the return trip, gave her some money orders to cash, and asked her about obtaining some kind of ID card. She had been living with Sandell for about two months at the time of these incidents.

Miss Neal identified two money orders which she had cashed, one of them at the Merlin-Rent-a-Car (Mr. Donald Hill). She testified that Royce Peake, an employee of Sandell's drove her to the Rent-a-Car office, that she had never seen Sandell with any American Express money orders or with a money order machine.

John Thomas Munn was a resident of the Sandell house. He testified that he was at Sandell's on Sunday, October 6, 1968, when Richard Seader, Joseph Gregory, and Minda Mondy paid a visit at about 10 o'clock in the morning. Sandra Jean Neal was also present. He heard no money orders mentioned. He saw the same

individuals at Sandell's on Tuesday afternoon but said that Sandell was not there. Later, Mondy, Gregory, and Seader came back with a fourth person. Sandell had arrived home by that time and ordered them to leave. Munn never saw any money orders or money order machine.

Munn was at the house on October 21, 1968, when detectives from the Palm Beach Sheriff's Office, armed with a search warrant, searched the house. It may be inferred from the record, although not specifically stated, that the searchers found a quantity of marijuana. No money order machine or money orders were found. Munn, Sandra Neal, and Sandell were arrested, taken to the county jail, and booked about 5:30 p.m.

This booking generated the second point in this appeal.

The automobile rented by Sandra Neal was not returned the next day as per contract. Donald Hill reported to the police. When Sandra Neal was arrested the police called Hill to come to the station to see if he could identify the arrested woman as the one who had rented the car. She was wearing a blond wig so Hill could not identify her until he was shown a wallet, containing some pictures, taken from Miss Neal's purse, which she had shown him when she rented the car. This, despite the wig, caused him to identify Miss Neal.

On his direct examination, Hill testified that after he found out that he had rented the car to a person

using the name of a person who knew nothing of the transaction the police showed him pictures of people who might have been the *male driver* of the automobile which brought Miss Neal to his place of business but he could make no positive identification, although one of them closely resembled the man who later turned out to be Sandell.

At the trial, Hill identified Sandell at the counsel table as the driver of the car.

We now excerpt pertinent portions of Hill's testimony.

"A. I was taken to the Palm Beach County jail by West Palm Beach Det. Wonderle to identify Miss Martha Austin, as I knew her. I saw her at a distance through the bars before I was brought into the room, and it was very hard to even identify her at that time because of her appearance — when she came to rent the car it was entirely different. As far as the color of the hair, clothing, and the feminine build was even a little bit different than when she came and rented the car from me.

"Q. Well, did you identify him [Sandell] subsequently?

"A. Yes.

"Q. At a lineup?

"A. No, sir, he was standing right in with other prisoners that were in the — at the booking desk.

"Q. Were there any other people other than Mr. Sandell there?
"A. Oh, there were a number of people standing in the lobby.
"Q. How many?
"A. Four or five men, one other woman — two women besides Martha Austin.
"Q. Was Mr. Sandell pointed out to you?
"A. No, sir.
"Q. Was any suggestion made by anybody to you to select Mr. Sandell?
"A. No, sir, he just asked me if I recognized anybody in that group.
"Q. Who asked you?
"A. The detective.
"Q. Mr. who?
"A. Mr. Wonderle.
"Q. Where did you go when the car was brought there?
"A. The young lady walked out to the car and spoke to the gentleman in the car. I walked to the front door and then to the car with her.
"Q. You didn't go over to the car where the man was?
"A. Not any further than right here (indicating).
"Q. How many feet from the car were you?
"A. 10 — 10 to 12 feet.
"Q. From the passenger side of the car?
"A. That is correct.
"Q. Sir, didn't you tell Sgt. Wonderle that you could not identify him and, in fact, you

couldn't even identify the girl at that time?

"A. Oh, yes, I could.

"Q. That's your sworn testimony here, that you walked into that jail and identified both of them, just like that?

"A. There were some other circumstances that made me identify them, yes. The young lady had a picture of her son in her wallet that she showed to me at the time she rented the car. I commented on it, that she had this picture in this wallet.

"Q. And when she brought her wallet — you said that this is the girl, because of the wallet — before you saw this wallet you identified her?

A. I saw it before that. I identified her by the fingernails.

"Q. What type of fingernails.

"A. Very long fingernails and two chipped teeth in the front.

"Q. Mr. Hill, when you went to the jail, how many white males did you see there?

"A. Three, four, five, I don't remember exactly. There were a lot of people standing there, inmates as well as officers.

"Q. There was only one person with handcuffs on, wasn't there?

"A. I didn't see anybody in handcuffs.

"Q. You didn't see Thomas Ray Sandell in handcuffs?

"A. No, I was not that close to him to see handcuffs.

"Q. How far away were you when you made that identification?
"A. About as far as you and I are here. His back was to the wall at the time.
"Q. Was this in front of the booking desk in the Palm Beach County Jail?
"A. Yes, sir.
"Q. Where were you at that time?
"A. At the entrance.
"Q. Looking through two doors, two barred doors — are there, aren't they?
"A. No, I came through the Detective Division, at the westerly —
"Q. So you looked through a barred door there?
"A. It's just plain bars.
"Q. So it is a door containing bars?
"A. No, it's just one big gate-like. There wasn't glass in it.
"Q. A big gate containing bars?
"A. Yes, sir.
"Q. And you looked through that?
"A. Yes, sir.
"Q. Now, when you looked through to the booking desk — do you recall that there are two barred gates?
"A. Yes, sir.
"Q. Did you look through two barred gates at Mr. Sandell?
"A. I was inside the other one, inside the first gate.
"Q. You were inside the first gate — looking through the bars of the second gate?
"A. Yes.

"Q. Did you make a statement at any time, sir, that you couldn't identify either of the two people that were in front of the booking desk?

"A. At the time I believe I told the sergeant that I wasn't quite sure because of the change in the young lady and I said I would have to see her up closer.

"Q. Then when she brought her wallet out and you saw the picture of the boy —

"A. That was much later.

"Q. How much later?

"A. 45 minutes to an hour later.

"Q. Where did you see her 45 minutes to an hour later?

"A. It was in a little room with a table.

"Q. You were brought into a smaller room with Miss Austin?

"A. Yes, sir.

"Q. And then you identified the girl that you had made this contract with and walked outside with and walked over and showed her how to work the car —

"A. Yes.

"Q. Then you identified her?

"A. Yes.

"Q. When did you decide that it was Sandell that drove her there?

"A. I didn't know the gentleman's name. I just identified him as being the gentleman.

"Q. Did you go into another room after looking through these bars — with Sandell — like you did with the girl?

"A. No, sir.

"Q. Was there a conducted lineup that the police were doing for you?

"A. No, sir, they looked like they were being booked.

"Q. They were all being booked?

"A. That's what appeared to me, yes.

"Q. There were detectives there and there were prisoners there?

"A. Yes, sir.

"Q. Now, this is my point — wasn't Sandell and the Austin girl being booked in at that time and you were brought there and you were asked if you recognized these people and you said, 'I don't recognize these people,' and you said that you later recognized her; isn't that what happened?

"A. No, sir, it's not.

"Q. Mr. Hill, showing you this card case which has been marked as Exhibit No. 22 for identification for the Government — can you identify that?

"A. Yes, sir.

"Q. What is it, please?

"A. This is the wallet that Martha Austin had her driver's license in and when she handed it to me it had a picture, and she told me that this was her son."

Thomas Ray Sandell, age thirty-one, took the stand in his own defense. He had never been convicted of crime, was an accountant, a part time policeman, and an elected councilman in Royal Palm Beach. He also

was a minister. He admitted seeing Seader, Gregory, and Mondy on Sunday, October 6, 1968, at his home, but denied any criminal conduct whatsoever. He denied going to the bank or cashing the money order. He denied driving Sandra Neal to the Rent-a-Car agency.

He saw Hill at the jail on October 21, 1968. Hill was on the other side of the bars with Munn and Wonderle, police officers. For ten or fifteen minutes Hill kept shaking his head that he could not identify either Sandell or Neal. When Wonderle opened Neal's purse and took out the wallet then Hill said that he remembered the picture of the little boy and that there "was never any question that I [Sandell] had been there at the time". Sandell said that F.B.I. agent Philbin had told him that Hill could not identify him at the jail [Philbin denied making this statement].

On cross examination Sandell testified that he had been divorced from his wife in Palm Beach on December 6, 1965, had remarried after he was charged in this case, but had lived for nine months with Sandra Jane Neal without being married to her. He owned a 1966 blue corvair convertible. He claimed Seader came to his house to discuss marital difficulties — that he had performed the ceremony when Seader was married.

John Thomas Munn, in general, agreed with Sandell's version of what happened at the jail when he, Sandell, and Neal were booked. Specifically, he said that he heard Hill say at least twice that he could not identify Sandell until the wallet was produced.

We consider first the in-court identification supplied by Mrs. Chesser.

We are of the opinion that this identification was well within the guidelines laid down by *Simmons v. United States*, 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247. In that case Simmons was convicted of the armed robbery of a federally insured savings and loan association. He asserted that his pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or at least to require reversal of his conviction in the exercise of supervisory power over the lower federal courts. The Supreme Court disagreed. The photographs were shown the next day after the robbery to the bank employees separately. All of them identified Simmons as being one of the robbers. The Court held that these cases must be evaluated in the light of the totality of the surrounding circumstances, that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification", and that there was little chance that the use of the photographs led to the misidentification of Simmons. It is to be noted that six photographs had been displayed to the witnesses and there was no evidence that the officers in any way suggested who was under suspicion. Also, the witnesses had subsequently viewed the photographs, as in the case now before us, and had adhered to their original identifications. On

cross examination none of the witnesses displayed any doubt as to their respective identifications. Although the identification procedure used may have in some respects "fallen short of the ideal", the use of the photographs had not denied Simmons due process.

See, also, the decisions in this Circuit: *United States v. Sutherland,* 1970, 428 F.2d 1152; *United States v. Ervin,* 1971, ____ F.2d ____ [No. 30,442, January 18, 1971]; and *United States v. Elliott* and *Harris,* 1971, ____ F.2d ____ [No. 29,867, February 3, 1971].

Sandell complains that in the trial the presiding judge did not follow the procedure "suggested" in *United States v. Sutherland, supra,* 428 F.2d at 1155.

The answer to this is that Sandell was tried November 10-13, 1969. This "suggestion" was published April 29, 1970. Moreover, we do not find from the record that Sandell requested or was denied such a procedure. The District Court did hear and deny a motion to suppress the Chesser identification as being violative of *Simmons.* Thus, the trial court by another method, complied "in advance" with the rationale of the *Sutherland* suggestion. Sandell's right to a fair trial was in no way prejudiced in this regard.

We attach no signifcance to the initial display of photographs, which contained the mug shot. Mrs. Chesser had already identified a photograph of Sandell before she saw that shot. Even more convincingly, Mrs. Chesser had so completely forgotten seeing those

photographs that on the witness stand she could not be made to recall seeing them.

Nor is it of any prejudicial importance that through a glass in the courtroom Mrs. Chesser saw the back of a man whom she could not identify. The important consideration is that she recognized Sandell, on her own, when she encountered him in a corridor of the courthouse. See *United States v. Pollack*, 5 Cir., 1970, 427 F.2d 1168; *Fitts v. United States*, 5 Cir., 969, 406 F.2d 518.

In sum, we are of the view that Sandell wholly fails to bring himself within the "impermissibly suggestive" rule of *Simmons*.

The last facet for disposition is whether his confrontation with Hill during the booking process at the county jail requires reversal under the teachings of *United States v. Wade*, 1966, 388 U. S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149. *Wade*, according to the opening statement of the opinion of the Court, presented the question of "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel".

The Supreme Court held that in-court identification of defendants by witnesses to whom an accused is exhibited before trial *in the absence of counsel* must be excluded unless it can be established that such evidence

had an independent origin or that the error in its admission was harmless.

It would be correct to say, we think, that in the case now before us there was no lineup within the usual meaning of the term. The police had no intention of exhibiting Sandell at all. They did not have him there for identification. So far as this record shows he was not then suspected of participation in the money order case. According to the testimony of Sandell's witness, Munn, there had been a five hour search of Sandell's house and a quantity of marijuana had been found. Hill had been called to see if Neal might be the woman who had rented the car without returning it. This she came very near frustrating by wearing a wig. Hill testified that he saw no handcuffs on Sandell, that he was not close enough for that. Sandell and Munn said that Hill could not (at least at first) identify Sandell, although his purpose for being there was not to identify Sandell but to see if he could identify the woman as the one who had rented a car. Sandell had not been charged as to the money orders and, of course, had no attorney. Officer Wonderle testified that there had been no conversation about Sandell.

The better view of this situation is that Hill spontaneously recognized Sandell when he unexpectedly encountered him, even though the encounter was at a booking desk, where Hill had no prior idea that he would see him.

Should we be mistaken in this, however, we see no adequate basis for reversal. This identification dealt

only with whether Sandell drove Miss Neal to the Rent-a-Car office — that and that alone. As to his personal association with Miss Neal the proof from other witnesses showed, and he admitted, that for at least three months he had lived with Miss Neal, in the same house where the other witnesses said the stolen money order machine and the stolen money orders had been delivered to him. One automobile trip, contrasted with three months of living together, can hardly be elevated to the status of prejudicial error.

The judgment of the District Court as to both Seader and Sandell is

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1970

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No. 29679

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D. C. Docket No. CA-69-430-Cr-CF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD SEADER and THOMAS RAY SANDELL,
Defendants-Appellants

Appeal from the United States
District Court for the
Southern District of Florida

Before GEWIN, COLEMAN, and AINSWORTH,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

only with whether Sandell drove Miss Neal to the Rent-a-Car office — that and that alone. As to his personal association with Miss Neal the proof from other witnesses showed, and he admitted, that for at least three months he had lived with Miss Neal, in the same house where the other witnesses said the stolen money order machine and the stolen money orders had been delivered to him. One automobile trip, contrasted with three months of living together, can hardly be elevated to the status of prejudicial error.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1970

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No. 29679

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D. C. Docket No. CA-69-430-Cr-CF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD SEADER and THOMAS RAY SANDELL,
Defendants-Appellants

Appeal from the United States
District Court for the
Southern District of Florida

Before GEWIN, COLEMAN, and AINSWORTH,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 15, 1971

Issued As Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 29,679

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- vs -

RICHARD SEADER and THOMAS RAY SANDELL,
Defendants-Appellants.

---

Appeal from the United States
District Court for the
Southern District of Florida

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[April 22, 1971]

ON PETITION FOR REHEARING

Before GEWIN, COLEMAN, and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Thomas Ray Sandell in the above entitled and numbered cause be and the same is hereby DENIED.

## UNITED STATES CONSTITUTION

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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No. _____

18 USC 371
M/S $10,000 - 5 yrs.
18 USC 2314
M/S $10,000 - 10 yrs.

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UNITED STATES OF AMERICA, Plaintiff,

v.

SANDRA JEAN NEAL, THOMAS RAY SANDELL, RICHARD SEADER, and JOSEPH GREGORY, Defendants.

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INDICTMENT

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The Grand Jury charges:

COUNT ONE

That from on or about October 5, 1968, and continuous thereafter up to and including the date of the filing of this Indictment in the Southern District of Florida and elsewhere,

SANDRA JEAN NEAL,
THOMAS RAY SANDELL,
RICHARD SEADER, and
JOSEPH GREGORY,

the defendants, willfully and knowingly did combine, conspire, confederate, and agree together and with each other, and with others whose names are to the Grand Jury unknown, to commit offenses against the United States, that is, to transport in interstate commerce with unlawful and fraudulent intent, falsely made and forged securities, knowing same to have been falsely made and forged, and more particularly, American Express Company money orders which had been stolen on October 5, 1968, in a burglary of a Seven-Eleven Store located in Homestead, Dade County, Florida.

It was part of said conspiracy that the defendants would obtain false and fictitious indentification (sic) and credentials for use in filling out and cashing said stolen American Express Company money orders at various places in the Southern District of Florida, and thereafter said money orders would be transported in interstate commerce to New York, New York.

OVERT ACTS

The Grand Jury charges:

That in furtherance of the aforesaid conspiracy, and to accomplish the objects thereof, the defendants at the times and places hereinafter set forth did comit the following overt acts:

(a) On or about October 7, 1968, the defendants,

SANDRA JEAN NEAL,
THOMAS RAY SANDELL,
RICHARD SEADER, and
JOSEPH GREGORY

had a meeting at the residence of defendant, Thomas Ray Sandell, in the Village of Royal Palm Beach, Palm Beach County, Florida.

(b) On or about October 7, 1968, at West Palm Beach, Palm Beach County in the Southern District of Florida, the defendant, Sandra Jean Neal, cashed an American Express Company money order.

(c) On or about October 8, 1968, defendant Richard Seader cashed an American Express Company money order at the Citizens Bank in West Palm Beach, Palm Beach County, Southern District of Florida.

(d) On or about October 8, 1968, defendant Thomas Ray Sandell cashed an American Express Company money order at the First Federal Savings and Loan Association in West Palm Beach, Palm Beach County, Southern District of Florida.

(e) On or about October 8, 1968, defendant Joseph Gregory cashed an American Express Company money order at the Citizens Bank in West Palm Beach,

Palm Beach County, Southern District of Florida.

(f) On or about October 11, 1968, at Palm Beach Gardens, Palm Beach County in the Southern District of Florida, the defendant, Sandra Jean Neal, cashed an American Express Company money order; all in violation of Title 18, United States Code, Section 371.

COUNT TWO

The Grand Jury charges:

That on or about October 8, 1968, at West Palm Beach, Palm Beach County, in the Southern District of Florida, defendant

THOMAS RAY SANDELL

did transport and cause to be transported in interstate commerce with unlawful and fraudulent intent from West Palm Beach, Florida, to New York, New York, a falsely made and forged security, to wit, American Express Company money order No. AT 737-008-664, dated October 7, 1968, payable to Clifton J. Carlin in the amount of $50.00, knowing same to have been falsely made and forged; in violation of Title 18, United States Code, Section 2314.

COUNT THREE

The Grand Jury charges:

That on or about October 8, 1968, at West Palm Beach, Palm Beach County, in the Southern District of Florida, defendant

RICHARD SEADER

did transport and cause to be transported in interstate commerce with unlawful and fraudulent intent from West Palm Beach, Florida, to New York, N. Y., a falsely made a d forged security, to wit: American Express Company money order No. AT 737-008-595, dated September 28, 1968, payable to Thomas O'Shea in the amount of $70.00, knowing same to have been falsely made and forged; in violation of Title 18, United States Code, Section 2314.

COUNT FOUR

The Grand Jury charges:

That on or about October 8, 1968, at West Palm Beach, Palm Beach County, in the Southern District of Florida, defendant

JOSEPH GREGORY

did transport and cause to be transported in interstate commerce with unlawful and fraudulent intent from West Palm Beach, Florida, to New York, N. Y., a falsely made and forged security, to wit: American Express Company money order No. AT 737-052-630,

dated October 7, 1968, payable to Clifton J. Carlin in the amount of $60.00, knowing same to have been falsely made and ofrged; in violation of Title 18, United States Code, Section 2314.

COUNT FIVE

The Grand Jury charges:

That on or about October 9, 1968, at West Palm Beach, Palm Beach County, in the Southern District of Florida, defendants

SANDRA JEAN NEAL and
RICHARD SEADER

did transport and cause to be transported in interstate commerce with unlawful and fraudulent intent from West Palm Beach, Florida, to New York, N. Y., a falsely made and forged security, to wit: American Express Company money order No. AT 737-052-618, dated September 26, 1968, payable to Martha Austin in the amount of $100.00, knowing same to have been falsely made and forged; in violation of Title 18, United States Code, Section 2314.

COUNT SIX

The Grand Jury charges:

That on or about October 9, 1968, at West Palm Beach, Palm Beach County, in

the Southern District of Florida, defendant

SANDRA JEAN NEAL

did transport and cause to be transported in interstate commerce with unlawful and fraudulent intent from West Palm Beach, Florida, to New York, N. Y., a falsely made and forged security, to wit; (sic) American Express Company money order No. AT 737-052-615, dated September 26, 1968, payable to Martha Austin in the amount of $100.00, knowing same to have been falsely made and forged; in violation of Title 18, United States Code, Section 2314.

A TRUE BILL

_____
FOREMAN

WILLIAM A. MEADOWS, JR.
UNITED STATES ATTORNEY

Lloyd G. Bates, Jr.
Assistant United States Attorney

# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-191

THOMAS RAY SANDELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 15, 1971, and a petition for rehearing was denied on April 22, 1971 (Pet. App. C). The petition for a writ of certiorari was filed on May 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



429-969—71——1

## QUESTIONS PRESENTED

1. Whether the in-court identification of petitioner was tainted by impermissibly suggestive pretrial photographic identification procedures.

2. Whether a second in-court identification was the result of an improper lineup.

3. Whether statements made by petitioner in a post-conspiracy conversation with a codefendant were properly admitted.

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count charging that he and three codefendants conspired to cause forged money orders to be transported in interstate commerce, in violation of 18 U.S.C. 371, and one count charging that he individually committed one such substantive offense, in violation of 18 U.S.C. 2314 (Pet. App. 45–51; R. 911).[1] He was sentenced to five years' imprisonment on each count, to run concurrently. The court of appeals affirmed (Pet. App. 1–22).

On October 5, 1968, Joseph Gregory, Elmo Midyette, and Richard Seader stole 180 American Express Company money order forms and a money order machine in a burglary of a Seven-Eleven store in Homestead, Florida. Gregory and Seader were indicted along with petitioner; Gregory pleaded guilty before trial and testified for the government, and Seader was convicted with petitioner.[2] Midyette was a government witness at the trial. (Pet. App. 5; R. 115, 438.)

[1] "R." refers to the trial transcript in two consecutively paginated volumes, a copy of which is being lodged herewith.

[2] Seader's conviction was also affirmed by the court of appeals, and he has not petitioned for a writ of certiorari.

Following the theft, the three "printed up" some of the money order forms and then abandoned the remainder and the machine. On the following day, Gregory, Seader, and another government witness, Minda Shiland, drove to petitioner's house in West Palm Beach, Florida. On the way Seader stated that he intended to arrange a sale of the money order machine to petitioner. Petitioner met with them and agreed to give Gregory and Seader false identification papers in exchange for the money order machine and some of the money order forms. Gregory and Seader promptly retrieved the money order machine and the money order forms. Again accompanied by Mrs. Shiland, they returned to petitioner's house, where Seader delivered the machine and the order forms to petitioner. (Pet. App. 4–5; R. 31–32, 34, 37–41, 54, 116–119, 440–442, 527–528, 652–653.)

Gregory, Seader, and Mrs. Shiland returned to petitioner's house on two other days later the same week. During these visits Gregory and Seader received from petitioner their false identification papers, consisting *inter alia* of Florida driver's licenses, typed by petitioner, in the names of persons picked from the telephone book. Gregory's license purported to have been issued to one Clifton Carlin. Gregory told petitioner that he was a musician for purposes of completing the license form. The fictitious licenses were used by Gregory and Seader in cashing a large number of the money orders which subsequently entered the channels of interstate commerce (Pet. App. 5; R. 41–42, 57–58, 94, 260, 331–332, 371–372, 442–446, 463–465, 519).

A third codefendant, Sandra Neal, also pleaded guilty prior to trial. She had been living with petitioner during the period involved. Using a fictitious Florida driver's license for identification purposes, she passed several of the stolen money orders, including one which she gave as deposit on a rental car. Miss Neal, who admitted passing the money order, was driven to the rental agency by a male companion in a blue Corvair convertible owned by petitioner. Donald Hill, the proprietor of the agency, identified petitioner as Miss Neal's companion. (Pet. App. 9, 11, 22; R. 408–415, 726–728.)

The money order that petitioner was charged with passing bore the name Clifton Carlin as payee and was cashed on October 8, 1968, at a branch office of a West Palm Beach savings and loan association. Mrs. Carroll Chesser, the teller who cashed the money order, identified petitioner as the person who presented it. She stated that petitioner presented a Florida driver's license issued in Carlin's name for identification and told her that he was playing in a band in Miami (Pet. App. 6; R. 259, 263).

## ARGUMENT

1. Relying on *Simmons* v. *United States*, 390 U.S. 377, petitioner contends that Mrs. Chesser's in-court identification of him was improperly admitted because it was tainted by suggestive pre-trial photographic identification procedures (Pet. 7–9). In *Simmons*, the Court concluded that photographic identification there was not improper. It admonished that "each case must be considered on its own facts" and stated

that an in-court identification should be set aside "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (390 U.S. at 384). The court of appeals carefully considered petitioner's contention (Pet. App. 6–8, 18–20) and concluded that Mrs. Chesser's identification "was well within the guidelines laid down by *Simmons*" (Pet. App. 18). We believe that conclusion was correct and that there is no occasion for further review of this essentially factual question.

Mrs. Chesser initially identified petitioner through a "mug shot" taken three days previously (Pet. 5–6; R. 231–235). She had already identified a photograph of petitioner—tentatively—before she saw that picture (Pet. App. 19).[3] At trial, she was positive that it was petitioner who had presented the money order (R. 198–199) and testified that she had seen him entering the courtroom on the preceding day without his being pointed out to her (R. 201). She adhered to her identi-

[3] The initial identification occurred on October 24, 1968, two weeks after the money order was cashed. Detective Wonderle of the West Palm Beach Police Department was examined out of the presence of the jury and testified that he presented a group of six photographs to Mrs. Chesser, including two of petitioner—the mug shot and an ordinary photograph taken in 1965. Mrs. Chesser examined the photographs one by one. When she came to the third picture, the 1965 photograph, she "made a tentative identification, saying that it looked like the man but she was not sure." When she viewed the sixth photograph, the mug shot, she made a positive identification (R. 233–235). Wonderle testified that he also showed Mrs. Chesser a picture of Gregory (R. 236), who petitioner contends cashed the money order (Pet. 9), although it is not clear whether that picture was in the group of six photographs.

fication after Gregory (who petitioner claimed cashed the money order) was brought into the courtroom to test her recollection (R. 209–210). Gregory acknowledged that he passed one of the money orders at another financial institution in West Palm Beach, but denied that he cashed this one (R. 444–445). In these circumstances, we believe that while here, as in *Simmons*, the pre-trial identification procedures followed may have "fallen short of the ideal" (390 U.S. at 386), the trial court did not abuse its discretion in permitting Mrs. Chesser's in-court identification.[4]

2. Nor is there merit to petitioner's contention that witness Hill's in-court identification of him as the male companion of Miss Neal when she cashed one of the money orders at Hill's rental agency was erroneously allowed because Hill had made a pre-trial identification of him under circumstances which "amount[ed] to an improper lineup" (Pet. 9–12). The court of appeals also carefully considered this contention (Pet. App. 10–17, 20–22) and found that the pre-trial identification was not made at a "lineup" (Pet. App. 21). It occurred when Hill was taken to the county jail to identify Miss Neal. Petitioner was

[4] Moreover, Mrs. Chesser's testimony was critical only to petitioner's guilt on Count Two. Since the sentence on that count runs concurrently with the sentence on the conspiracy count, the Court could properly disregard petitioner's contentions on the issue as a matter of "judicial convenience." Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *McGee* v. *United States*, No. 362, this Term, decided May 17, 1971, slip op., p. 12, n. 5. This transaction was only one of five overt acts alleged in the conspiracy count (Pet. App. 47). Petitioner's guilt of the conspiracy charge did not depend on Mrs. Chesser's identification and rested on adequate and substantial evidence apart from her testimony.

at the booking desk for another offense, and Hill recognized him (Pet. App. 10, 21). As the court below noted: "The police had no intention of exhibiting Sandell at all. They did not have him there for identification. * * * The better view of this situation is that Hill spontaneously recognized Sandell when he unexpectedly encountered him, even though the encounter was at a booking desk, where Hill had no prior idea that he would see him" (Pet. App. 21). *United States* v. *Wade*, 388 U.S. 218, on which petitioner relies, has no application to these circumstances.

Moreover, Miss Neal admitted passing the fraudulent money order and Hill's identification dealt only with whether it was petitioner who had driven her to the place of business. The proof from other witnesses showed, and petitioner admitted, that he was living with Miss Neal at the time and had been for several months in the same house where the other witnesses said the stolen money order machine and money orders had been delivered to him. Hill's identification, therefore, was not prejudicial to petitioner's case: "One automobile trip, contrasted with three months of living together, can hardly be elevated to the status of prejudicial error" (Pet. App. 22).

3. Petitioner's contention that a post-conspiracy conversation between him and Gregory was improperly admitted in evidence (Pet. 12–13) is insubstantial. The conversation occurred during a jailhouse visit with Gregory about a month prior to trial and concerned who the likely government witnesses would be. Gregory testified that petitioner told

him Mrs. Shiland "didn't really see too much at the house," but nonetheless it would be better if she did not testify, and that if she did not petitioner would probably go free (R. 454, 460–462). These statements were purportedly made by petitioner himself, and were admissible as evidencing consciousness of guilt. Thus, the fact that they occurred after the conspiracy had terminated is immaterial. Cf. *Rich* v. *United States*, 384 F. 2d 887, 888 (C.A. 5).

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE
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UNITED STATES OF AMERICA, Respondent.

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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# REPLY BRIEF OF PETITIONER

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Petitioner, pursuant to Rule 24(4) of the rules of this court, files this Reply Brief addressed to arguments raised in the brief of the government.

## CLARIFICATION OF STATEMENT

The statement contained in the government's brief is in some respects argumentative rather than factual. It is true, as stated by the government, that the record may support a conviction for receiving stolen property (see government's brief, page 3); however, petitioner was not charged with such a crime. In the record there is nothing to show that petitioner was told why the false

identification papers were wanted, but merely that he sold the false identification for a money order machine. While it is true that Mr. Donald Hill did identify petitioner, a very material fact is that he first identified one of the others indicted by the same indictment, Count Five, which was dismissed after Mr. Hill's in-court identification of petitioner on the second day of trial.

## ARGUMENT

The government attempts in its brief to show that the in-court identification of petitioner by Miss Chesser, a teller in a savings and loan association, was either proper or, if improper, was harmless since he was convicted on another count anyway. This is a fallacious argument. This identification was crucial to the government's case against petitioner. The government further states that the detective who first interviewed the witness showed her a photograph of Gregory (the man who was probably the one who actually cashed the money order petitioner is accused of cashing) but the exhibit (government's 9) shows that he did not show her a picture of <u>that</u> Joseph Gregory. Government's exhibit 8-A shows what Gregory looked like at the time in question (R469-471). This was not the same Joseph Gregory depicted in Government Exhibit 9 (Ex. 9-A). The argument is therefore a misleading argument.

The fact remains that the witness had the impression obtained from the first photographic identification so

fixed in her mind--even though she denied making such an identification--that she identified (mistakenly) petitioner at trial. See Simmons V. United States, 390 U.S. 337, 19 L. Ed. 2d 1247, 88 S. Ct. 967(1968).

The government also argues that Gregory denied cashing the money order in question. This is only a half truth. He did at first, on direct examination, say he did not cash a money order at First Federal in West Palm Beach, but later, on cross examination, he testified that: he was under the influence of narcotics (R 486); his false identification was in the name of Clifton J. Carlin (R 494); the signature endorsement (Clifton J. Carlin) on the money order in question is his (R 500, 530); he does not know how many money orders he cashed (R 504); he does not know where he cashed all of the money orders (R 504, 530-531); he was alone when he cashed one at a bank he just happened to be passing by (R 445); and he was with the defendant Seader when he cashed another (R 531). It is petitioner's belief that the one Gregory cashed at a bank he "happened to be going by" was cashed at First Federal and is the one he (Gregory) said he endorsed. This seems to be a classic case of mistaken eye-witness identification. No authority need be cited that this is very often unreliable.

The government also belittles petitioner's contention that Mr. Hill's identification was in error, by indicating that since petitioner was living with Miss Neal it makes no difference that

petitioner was not charged as being the person involved in cashing the money order at Mr. Hill's place of business. This would appear to be an argument to the effect that since he was living with a woman other than his wife he must be guilty of something. The money order involved with Mr. Hill was No. AT 737-052-618. This was the money order involved in Count V of the indictment. Petitioner was not charged in this Count, therefore he had no reason to even attempt to prepare a defense to a charge of having anything to do with cashing this particular money order. He was, in effect, tried for something he was not charged with and as a matter of fact another person stood accused of this until after petitioner had been improperly identified (R 412). This was like leading petitioner into a trap unaware that Count V really was intended to apply to him. If petitioner was to be tried for the act described in Count V, he should have been indicted for it. This provision of the Fifth Amendment is absolute--it says that no person shall be held to answer for an infamous crime unless indicted. There is no qualification, just a flat prohibition. Our system of justice is basicly fair and this is one of the constitutional provisions that helps to assure that it will always remain fair. The Sixth Amendment also provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature of the accusation. For some reason, which appears only inferentially in the record, the government used as a witness against petitioner a man who had previously identified a co-defendant as the person who

who drove a young lady to the witness's business establishment where the young lady gave the witness a money order as a deposit on a rental car. The co-defendant was indicted, together with the young lady for transporting the money order (a forged security) in interstate commerce (Indictment, Count Five). It seems clear that the government itself considered Mr. Hill as an unreliable witness. The improper lineup took place in October or November of 1968 (Tr. 419), the indictment was filed in 1969, but petitioner was not charged in the indictment.

The government also argues that Miss Neal admitted passing the fraudulent money order (government's brief, 7). She also told the court and jury who it was that drove her to Mr. Hill's place of business, and it was not petitioner (Tr. 727-728). It is asserted by the government that the identification at the jail by Mr. Hill was not a lineup identification, but the physical description of the events surrounding this identification fit a lineup even if the word is not used (Tr. 418; 419; 426; 428-430), and it took him forty-five minutes to an hour to make any identification (Tr. 428).

## CONCLUSION

The fundamental nature of the guarantee of the Fifth Amendment that no person shall be held to answer for an infamous crime unless on a presentment or indictment by a grand jury, and of the guarantee of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy

the right to be informed of the nature and cause of the accusation were violated by the trial of petitioner on the charge of Count Five of the indictment. He was not charged in this Count, yet the government as a matter of actual fact tried him for it by having the witness Hill identify him before the jury as the person involved, and then dismissing this Count as it applied to the other defendant charged thereby. The facts surrounding the improper lineup identification and the apparent confusion of the witness all point up the necessity of safeguards as pronounced by United States V. Wade (1967) 388 U.S. 218; 18 L. Ed. 2d 1149; 87 S. Ct. 1926.

To compound this error the witness against petitioner regarding Count One (d) and Count Two was a witness with an obviously faulty memory who had viewed a recent mug shot of petitioner from a set of photographs containing two photographs of petitioner. She chose this emphasized person who was obviously in custody as the person who cashed a forged money order. She forgot about making this photographic identification, but about a week before the trial she was shown the same photographs and picked out the same one. She observed petitioner in the courtroom (but from the back). She then made an in-court identification. It is petitioner's belief that her memory of him was a memory gained from the impression or image of the first, and forgotten, photographic identification. Except for this mistaken in-court identification, all of the evidence at the trial indicated that another person who had been named in the same indictment

(Counts One and Four) had cashed the particular money order. Petitioner submits that the identification of him by this witness, tainted by impermissibly suggestive pretrial procedures, was error.

Petitioner submits that his conviction should be reversed and upon retrial the identification by Chesser and Hill should be excluded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief of Petitioner have been served upon: Solicitor General, Department of Justice, Washington, D.C. 20530 by Air Mail, postage prepaid, and one copy on United States Attorney, P. O. Box 1070, Miami, Florida, by first-class mail, postage prepaid, this 3rd day of September, 1971.

**JOHN S. CALL, JR.**

JOHN S. CALL, JR., Atty.